2006 Report of the Supreme Court Civil Practice Committee

January 20, 2006

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *R.* 1:4-9 — Size, Weight and Format of Filed Papers

The expansion of electronic filing and imaging (scheduled to be implemented in the Special Civil Part in all counties by the end of calendar year 2006) requires that papers that are not filed electronically be scanned in manually. Some firms, however, submit pleadings on onionskin paper, which wreaks havoc on the scanner. In order to avoid the delay and expense caused by jammed scanners, the Committee recommends that *R.* 1:4-9 be amended to specify that papers filed with the court be prepared on a standard weight for copy paper.

The proposed amendments to *R.* 1:4-9 follow.

1:4-9. Size, Weight and Format of Filed Papers

Except as otherwise provided by *R.* 2:6-10, pleadings and other papers filed with the court, including letter briefs and memoranda but excluding preprinted legal forms and documentary exhibits, shall be prepared on letter size (approximately 8.5 x 11 inches) paper of [customary] standard weight and quality for copy paper and shall be double spaced with no smaller than 10-pitch or 12-point type. Both sides of the paper and recycled paper may be used, provided legibility can be maintained.

Note: Source — *R.R.* 1:27C; caption and text amended June 29, 1990 to be effective September 4, 1990; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

B. Proposed Amendments to *R.* 1:5-7 — Non-Military Affidavit

In the 2002-2004 rules cycle, the Committee supported, and the Supreme Court approved, amendments to *R.* 1:5-7 to specify that the affidavit of non-military service must either be based on facts admissible in evidence or have attached to it a statement from the United States Department of Defense that the defendant is not in military service. A Notice to the Bar listed the sources from which such statements could be obtained. Specifically, it was noted that there is a website that will provide the appropriate statement based on submission of the defendant's social security number. Neither the rule amendment nor the Notice to the Bar addressed what the affidavit should contain when the affiant is unable to determine whether the defendant was in military service because the social security number of the defendant is unknown.

The Servicemembers Civil Relief Act, 50 App. *U.S.C.A.* §521 provides that when it cannot be determined whether the defendant is in the military, the affiant must affirmatively state that he or she was unable to make the determination. The court may then require the plaintiff to post a bond. It was suggested that *R.* 1:5-7 be amended to include a similar provision.

The Committee agreed that more specific language is needed to provide guidance when the affiant does not have personal knowledge of the defendant's military status and the social security number of the defendant is not known, thus making it impossible to utilize the Department of Defense's website. The Committee concluded that the language of the rule should mirror that of the Servicemembers Civil Relief Act, 50 App. *U.S.C.A.* §521, with the bond requirement left to the discretion of the trial judge.

The proposed amendments to *R.* 1:5-7 follow.

1:5-7. Non-Military Affidavit

[An affidavit setting forth facts showing that the defendant is not in military service shall be filed as required by law before entry of judgment by default against such defendant. Such affidavit may be included as part of the affidavit of proof. Unless based on facts admissible in evidence, the affidavit shall have attached to it a statement from the Department of Defense or from each branch of the armed forces that defendant is not in military service.]

Before entry of judgment by default, an affidavit, which may be filed as part of the affidavit of proof, shall be filed as required by law setting forth facts showing that the defendant is not in military service. Unless based on facts admissible in evidence, the affidavit shall have attached to it a statement from the Department of Defense or from each branch of the armed forces that the defendant is not in the military service. If the plaintiff is unable to determine whether the defendant is in military service, the affidavit shall so state, and the court, before entering judgment, may require the plaintiff to post a bond in an amount approved by the court to indemnify the defendant, if later found to have been in military service, against any loss or damage resulting from the judgment should it be set aside. The bond shall remain in effect until expiration of the time for appeal and setting aside of the judgment.

Note: Source — *R.R.* 7:9-3; amended July 28, 2004 to be effective September 1, 2004; amended _____ to be effective _____.

C. Proposed Amendments to *Rules* 1:6-2 and 1:6-4 — re: Filing of Motion Papers

Rule 1:6-2(b) provides that motions should be made directly to the judge assigned to the case whereas *R.*1:6-4 states that the original of all motion papers shall be filed in accordance with *R.* 1:5-6 (b) (*i.e.* with the deputy clerk of the court in the county of venue) or with the judge to whom the motion is assigned, if known. Under the current system, a judge is assigned to each case when it is docketed. Pursuant to the rules as currently constituted, then, all motions should be filed with or made directly to that judge. The Conference of Civil Presiding Judges, however, strongly indicated that they did not want the originals or copies of motion papers going directly to the judges before being processed by staff. Further, motions are now required to be accompanied by a $30 fee, which judges' chambers are not equipped to handle. Accordingly, the Committee agreed that the rules should be amended to clarify that motion papers should be filed with the clerk, not the judge.

The proposed amendments to *Rules* 1:6-2 and 1:6-4 follow.

1:6-2. Form of Motion; Hearing

(a) ...no change.

(b) Civil Motions in Chancery Division and Specially Assigned Cases. When a civil action, by reason of its complexity or other good cause, has been specially assigned prior to trial to an individual judge for disposition of all pretrial and trial proceedings and in all cases pending in the Superior Court, Chancery Division, [all motions therein shall be made directly to the judge assigned to the cause, who] the judge, upon receipt of motion papers, shall determine the mode and scheduling of [their] the disposition of the motion. Except as provided in *R.* 5:5-4, motions filed in causes pending in the Superior Court, Chancery Division, Family Part, shall be governed by this paragraph.

(c) ...no change.

(d) ...no change.

(e) ... no change.

(f) ...no change.

Note: Source — *R.R.* 3:11-2, 4:8-5(a) (second sentence). Amended July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978; former rule amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (f) amended January 21, 1999 to be effective April 5, 1999; paragraphs (c) and (d) amended July 5, 2000 to be effective September 5, 2000;

paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended to be effective _____.

1:6-4. Superior Court; Place for Filing Motions, Orders to Show Cause and Orders

The original of all motion papers, orders to show cause and orders in civil actions in the Superior Court shall be filed in accordance with *R.* 1:5-6(b), except that in all actions in the Chancery Division or specially assigned to a judge of the Law Division or, if the judge to whom the motion is assigned is known, a copy of all motion papers shall also be [filed with] simultaneously submitted to the judge.

Note: Source — *R.R.* 3:11-1, 4:5-5(b) (first sentence), 4:5-6(b); amended July 16, 1981 to be effective September 14, 1981; caption amended and paragraphs (a) and (b) adopted November 7,1988 to be effective January 2, 1989; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; former caption and text replaced July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; revised _____ to be effective _____.

D. Proposed Amendments to *R.* 1:10 — Contempt of Court and Enforcement of Litigant's Rights Related Thereto

The Judicial Council expressed concern that the current caption of *R.* 1:10 confuses the reader into thinking that the procedures undertaken pursuant to *R.* 1:10-3 (Relief to Litigant) constitute contempt proceedings as is the case with *R.* 1:10-1 (Contempt in Presence of Court) and *R.* 1:10-2 (Summary Contempt Proceedings on Order to Show Cause or Order for Arrest). Acknowledging this concern, the Committee agreed to recommend that the caption be rewritten as "Contempt of Court; Enforcement of Litigant Rights" to indicate that there are two different sorts of relief available under the rule.

The proposed amendments to *R.* 1:10 follow.

RULE 1:10. CONTEMPT OF COURT;[AND] ENFORCEMENT OF LITIGANT'S RIGHTS [RELATED THERETO]

1:10-1. ...no change.

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

Note: Source — *R.R.* 4:87-1, 8:8; amended July 13, 1994 to be effective September 1, 1994; caption amended to be effective .

E. Proposed Amendments to *R.* 1:38 — Confidentiality of Court Records

The Supreme Court in *Estate of Frankl v. Goodyear,* 181 *N.J.* 1 (2004) asked the Committee to consider whether the Court should maintain its position that unfiled discovery is insulated from forced public access or whether changes are warranted in that approach. The matter was referred to the Protective Order Subcommittee, chaired by Professor Howard Erichson, which took the position that there is no wholesale, public right of access to unfiled discovery materials. Accordingly, it was suggested that *R.* 1:38 be amended to clarify that unfiled discovery materials are not considered public documents available for public review and copying. The Committee supported this suggestion.

Note: These proposed rule amendments address in part the issues taken up by the Protective Order Subcommittee, which will be discussed in detail in a supplement to this report.

The proposed amendments to *R.* 1:38 follow.

RULE 1:38. CONFIDENTIALITY OF COURT RECORDS

All records which are required by statute or rule to be made, maintained or kept on file by any court, office or official within the judicial branch of government shall be deemed a public record and shall be available for public inspection and copying, as provided by law, except:

(a) Personnel and pension records;

(b) Criminal, Family, and Probation Division records pertaining to investigations and reports made for a court or pertaining to persons on probation;

(c) Completed jury questionnaires, which shall be for the exclusive use and information of the jury commissioners and the Assignment Judge, and the preliminary lists of jurors prepared pursuant to *N.J.S.A.* 2A:70-1 and 2, which shall be confidential unless otherwise ordered by the Assignment Judge;

(d) Records required by statute or rule to be kept confidential or withheld from indiscriminate public inspection;

(e) Records in any matter which a court has ordered impounded or kept confidential;

(f) Records of programs approved for operation under *R.* 3:28 and reports made for a court or prosecuting attorney pertaining to persons enrolled in or under investigation for enrollment in such programs;

(g) Records of programs approved for operation under *R.* 7:8-1;

(h) Reports required to be prepared by trial court judges and municipal court judges on a weekly, monthly, or other basis and submitted to the Administrative Director of the Courts pursuant to *R.* 1:32-1;

(i) Records and information obtained and maintained by the Judicial Performance Committee pursuant to *R.* 1:35A, except as otherwise provided in that rule;

(j) Discovery materials obtained by the criminal division manager's office from the prosecutor pursuant to *R.* 3:9-1 and *R.* 3:13-3.

Nothing in this rule shall be deemed to constitute unfiled discovery materials in any action as public records available for public inspection and copying.

Note: Source — *R.R.* 1:29-2 (second and third sentences), 1:35. Paragraph (f) adopted April 1, 1974 effective immediately; paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraphs (e), (f) and (g) amended and paragraphs (h) and (i) adopted November 7, 1988 to be effective January 2, 1989; paragraph (j) adopted July 13, 1994 and new text amended December 9, 1994, to be effective January 1, 1995; paragraph (g) amended January 5, 1998 to be effective February 1, 1998; paragraph (b) amended July 28, 2004 to be effective September 1, 2004; last paragraph added _____ to be effective _____.

F. Proposed Amendments to *R.* 2:2-3 —re: Appeals from Final Decisions and Interlocutory Appeals

In *Moon v. Warren Haven Nursing Home,* 182 *N.J.* 507, 517 (2004), the Supreme Court referred to the Civil Practice Committee the issue of whether an order permitting the late filing of a notice of tort claim is interlocutory or final for purposes of an appeal. In its decision, the Court held that such an order is interlocutory for the following reasons: it does not dispose of all issues as to all parties; it avoids piecemeal litigation while allowing the Appellate Division the discretion to decide when interlocutory review of non-final judgments is necessary; it is consistent with the purposes of the notice provision of the Tort Claims Act (TCA); and it allows the litigation process to continue. *Id.* at 515.

The Court acknowledged, however, that there may be policy reasons for considering the order final and appealable as of right. Specifically, allowing a public entity to appeal an order granting leave to file a late notice of claim may reduce the financial burden on the public entity and accords with the overall purpose of the TCA of preserving sovereign immunity. Additionally, the Court noted that *R.* 2:2-3(a) already enumerates some trial court orders which, though apparently interlocutory, are considered final and appealable as of right, and suggested that the Committee consider whether a trial court order granting plaintiff leave to file a late notice of claim should be added to the list. Further, the Court commented that the common rationale for deeming those interlocutory orders as final is to avoid the situation where a party will be substantially prejudiced if an immediate appeal is not allowed. The Court left "...to the Committee's judgment the task of evaluating relevant factors, including the policy arguments discussed in this opinion; the impact that any change will have on plaintiffs and public entities; whether the rationale of *Rule* 2:2-3 applies to orders granting leave to file late notices of claims

under the TCA; and any other policy concerns the Committee may have. Finally, because principles of judicial economy also must inform the Committee's recommendation, it should consider the impact of an amendment to the rule on the Appellate Division." *Id.* at 518.

The Committee determined that the Tort Claims Act provides for a separate action for a petition for an extension of time to file a claim against a public entity, *N.J.S.A.* 59:8-9.[1] Accordingly, it concluded that the order granting or denying that application is a final judgment for purposes of appeal. Even if, as in the *Moon* case, the petition is not brought in a separate action as contemplated by the statute, it is a final order, appealable as of right. The Committee recommends that clarifying language be added to *R.* 2:2-3.

The Appellate Division Rules Committee supports these proposed amendments.

The Committee further agreed to recommend that an Administrative Directive be issued to trial judges reminding them to follow the provisions of *N.J.S.A.* 59:8-9 (see footnote), when dealing with applications to file a late notice of tort claim.

The proposed amendments to *R.* 2:2-3 follow.

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[1] "A claimant who fails to file the notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the pubic employee has no been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter; provided that in no event may any suit against a pubic entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim." *N.J.S.A.* 59:8-9.

2:2-3. Appeals to the Appellate Division From Final Judgments, Decisions, Actions and From Rules; Tax Court

(a) ...no change.

(1) ...no change.

(2) ...no change.

(3) in such cases as are provided by law.

Final judgments of a court, for appeal purposes, shall also include those referred to by *R.* 3:28(f) (order enrolling defendant into the pretrial intervention program over the objection of the prosecutor), *R.* 3:26-3 (material witness order), *R.* 4:42-2 (certification of interlocutory order), *R.* 4:53-1 (order appointing statutory or liquidating receiver), *R.* 5:8-6 (final custody determination in bifurcated matrimonial action), and *R.* 5:10-6 (order on preliminary hearing in adoption action). An Order granting an extension of time to file a notice of tort claim pursuant to *N.J.S.A.* 59:8-9, whether entered in the cause or by a separate action, shall also be deemed final judgments of the court for appeal purposes.

(b) ...no change.

Note: Source — *R.R.* 2:2-1(a) (b) (c) (d) (f) (g), 2:2-4, 2:12-1, 3:10-11, 4:88-7, 4:88-8(a) (first sentence), 4:88-10 (first sentence), 4:88-14, 6:3-11(a). Paragraph (a) amended July 14, 1972 to be effective September 5, 1972; paragraph (b) amended November 27, 1974 to be effective April 1, 1975; caption and paragraph (a) amended June 20, 1979 to be effective July 1, 1979; paragraph (a) amended July 8, 1980 to be effective July 15, 1980; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(1) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (b) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a)(3) amended _____ to be effective _____.

G. Proposed Amendments to *Rules* 2:5-1 and 4:28-4 — re: Notice to Federal Authority When a Federal Statute or Regulation is Challenged

In *Glukowski v. Equity One, Inc.*, 180 *N.J.* 49, 72 (2004), the Supreme Court commented that, while *Rules* 2:5-1 and 4:28-4 require notification to the State Attorney General of a challenge to the validity of a State statute, rule, regulation, executive order, or franchise in a legal action, there is no concomitant requirement that notice be given a Federal authority when its laws or regulations are challenged in State court. Accordingly, the Court asked the Committee to consider an amendment to the rules to require that notice be given to the appropriate Federal officer and agency when a Federal law or regulation is challenged in a New Jersey court.

The Committee recognized that comity requires that the rule be amended accordingly. The Committee rejected a suggestion that service be effected via e-mail, proposing instead that service on the United States Attorney General be made by simultaneous certified or registered mail and ordinary mail, and on the New Jersey Attorney General by ordinary mail. The Committee also agreed that, for purposes of finality, there should be a 60-day time limit imposed for the submission of a motion to intervene by the Federal or State entity, but that the time period may be extended for good cause.

The Committee also recommends removal of the reference to summary disposition motions from the caption of subsection (f)2 and the redesignation of the subsections of (f)3.

The Appellate Division Rules Committee supports these proposed amendments.

The proposed amendments to *Rules* 2:5-1 and 4:28-4 follow.

2:5-1. Notice of Appeal; Order in Lieu Thereof; Case Information Statement

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) Contents of Notice of Appeal and Case Information Statement; Form; Certifications.

1. ...no change.

2. Form of the Case Information Statement; Sanctions[; Application for Summary Disposition]. The Case Information Statement shall be in the form prescribed by the Administrative Director of the Courts as set forth in Appendix VII and VIII of these Rules (civil and criminal appeals, respectively). The appellant's Case Information Statement shall have annexed to it a copy of the final judgment, order, or agency decision appealed from except final judgments entered by the clerk on a jury verdict. In the event there is any change with respect to any entry on the Case Information Statement, appellant shall have a continuing obligation to file an amended Case Information Statement on the prescribed form. Failure to comply with the requirement for filing a Case Information Statement or any deficiencies in the completion of this statement shall be ground for such action as the appellate court deems appropriate, including rejection of the notice of appeal, or on application of any party or on the court's own motion, dismissal of the appeal.

3. Requirements of Notice of Appeal.

[(i)] A. Civil Actions. In civil actions the notice of appeal shall set forth the name and address of the party taking the appeal; the name and address of counsel, if any; the names of all other parties to the action and to the appeal; and shall designate the judgment, decision, action or rule, or part thereof appealed from, the name of the judge who sat below, and the name of the court, agency or officer from which and to which the appeal is taken.

[(ii)] B. Criminal, Quasi-Criminal and Juvenile Delinquency Actions. In criminal, quasi-criminal and juvenile delinquency actions the notice of appeal shall set forth the name and address of the appellant; the name and address of counsel, if any; a concise statement of the offense and of the judgment, giving its date and any sentence or disposition imposed; the place of confinement, if the defendant is in custody; the name of the judge who sat below; and the name of the court from which and to which the appeal is taken.

[(iii)] C. All Actions. In addition to the foregoing requirements, the notice of appeal in every action shall certify service of a copy thereof on all parties, the Attorney General if necessary, and the trial judge, agency or officer. In all appeals from adult criminal convictions the notice of appeal shall certify service of a copy thereof and of a copy of the Case Information Statement upon the appropriate county prosecutor and the New Jersey Division of Criminal Justice, Appellate Section. In all actions the notice of appeal shall also certify payment of filing fees required by *N.J.S.A.* 22A:2. The notice of appeal shall also certify compliance with *R.* 2:5-1(f)(2) (filing of Case Information Statement), affixing a copy of the actual Case Information Statement to the notice of appeal. In all actions where a verbatim record of the proceedings was taken, the notice of appeal shall also contain the attorney's certification of compliance with *R.* 2:5-3(a) (request for transcript) and *R.* 2:5-3(d) (deposit for transcript), or a

certification stating the reasons for exemption from compliance. Certifications of compliance shall specify from whom the transcript was ordered, the date ordered, and the fact of deposit, affixing a copy of the actual request for the transcript to the notice of appeal.

(g) ...no change.

(h) Attorney General and Attorneys for Other Governmental Bodies. [If the validity of a State constitutional provision or of a statute, rule, regulation, executive order or franchise of this State is questioned on an appeal, the party raising the question shall mail notice of the appeal to the Attorney General unless he or she is a party to the appeal or has received notice of the action in the court below. If the validity of an ordinance, regulation or franchise of a governmental subdivision, affecting the public interest, is questioned on an appeal, the party raising the question shall mail notice of the appeal to the attorney or chief legal officer of such subdivision] If the validity of a federal, state, or local enactment is questioned, the party raising the question shall mail notice of the appeal, by ordinary mail, to the appropriate official identified by *R.* 4:28-4 unless he or she is a party to the appeal or has received notice of the action in the court below. The notice shall specify the provision thereof that is challenged and shall be mailed within 5 days after the filing of the notice of appeal, but the appellate court shall have jurisdiction of the appeal notwithstanding a failure to give the notice required by this rule.

Note: Source-*R.R.* 1:2-8(a) (first, second and fifth sentences) (b) (c) (d) (h), 1:4-3(a) (second sentence), 4:61-1(d), 4:88-8 (second sentence), 4:88-10 (second, third and fourth sentences), 6:3-11(b), 7:16-3. Paragraph (f) amended and paragraph (h) adopted July 7, 1971 to be effective September 13, 1971; paragraphs (a), (b), (e) and (f) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended October 5, 1973 to be effective immediately; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (b) and (f) amended July 29, 1977 to be effective September 6, 1977; paragraph (f) amended July 24, 1978 to be effective September 11, 1978; paragraph (e) amended and paragraph (f)(1) adopted and (f)(2) amended July 16, 1981 to be effective September 14, 1981; paragraph (d) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a),

(f) and (g) amended March 22, 1984, to be effective April 15, 1984; caption, paragraphs (a), (b), (e), (f)(1) and (f)(2) amended November 1, 1985 to be effective January 2, 1986; paragraphs (f)(1) and (f)(2) amended November 7, 1988 to be effective January 2, 1989; paragraph (h) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b), (e) and (f)(3)(i)(ii) and (iii) amended July 13, 1994 to be effective September 1, 1994; paragraphs (f)(2) and (f)(3)(i) amended June 28, 1996 to be effective September 1, 1996; paragraph (f)(1) amended July 5, 2000 to be effective September 5, 2000; caption of paragraph (f)(2) amended, paragraphs (f)(3)(i), (ii) and (iii) redesignated (f)(3)(A), (B) and (C), and paragraph (h) amended to be effective .

4:28-4. Notice to Attorney General and Attorneys for Other Governmental Bodies

(a) Actions Involving Validity of Statute, Ordinance, etc.; Unknown Owners.

(1) State enactments; unknown owners. If the validity of a State constitutional provision or of a statute, rule, regulation, executive order or franchise of this State is questioned in any action to which the State or an agency or officer thereof is not a party, the party raising the question shall give notice of the pendency of the action to the Attorney General. If the validity of an ordinance, regulation or franchise of a governmental subdivision of this State affecting the public interest is questioned in any action to which the subdivision or an agency or officer thereof is not a party, the party raising the question shall give notice of the pendency of the action to the attorney or chief legal officer of the governmental subdivision. The plaintiff in any action brought against unknown owners of or claimants to real property shall give notice of the pendency of the action to the Attorney General if the State is not already a party thereto.

(2) Federal enactments. If the constitutionality or validity of any federal statute, regulation, or other enactment of the federal government or any of its agencies is challenged in an action to which neither the federal government nor its agency or official is a party, the party raising the question shall give notice of the pendancy of the action to the United States Attorney General or duly appointed designee for service.

(b) ...no change.

(c) Form and Service of Notice. The notice required by this rule [may be served by ordinary mail and, where required by paragraph (a) of this rule,] shall have [attached thereto] annexed to it a copy of all pleadings then filed. [Where notice is required to be served upon the Attorney General, it shall be served as prescribed by *R.* 4:4-4(a)(7).] Notice to any official or agency of this state may be by ordinary mail. Notice to the United States Attorney General or

duly appointed designee shall be by registered or certified mail with simultaneous ordinary mail service.

(d) Intervention; Judicial Action. The federal, State or other [governmental subdivision] government or its officials or agencies shall be permitted[, upon timely application,] to intervene in [any] the action [as to which it has received notice pursuant to this rule] by motion filed and served within 60 days following its receipt of the notice required by this rule, which time shall be enlargeable on motion filed and served during said 60-day period. Such motions shall be freely granted for good cause and in the interests of justice. The court may reject the challenge prior to expiration of the time to intervene and may grant interlocutory relief, but may not, until such time, enter a final judgment declaring the enactment invalid.

Note: Source — *R.R.* 4:37-2, 4:117-6. Paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (b) amended June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a), (c), and (d) amended _____ to be effective _____.

H. Proposed Amendments to *Rules* 2:6-12, 2:12-7 and 2:12-8 — re: Number of Briefs and Appendices to Be Filed

It was brought to the attention of the Committee that the language in *R.* 2:6-12(b) requires counsel to make and retain nine additional copies of an Appellate Division brief and appendix at the time of filing, in the event of further appeal. It was ascertained that this requirement stemmed from the time when briefs and appendices had to be reproduced at a print shop. The Committee agreed that this language is superfluous and should be removed from the rule.

Similarly, in recognition of the availability of in-house copying facilities, the Committee proposes an amendment to *R.* 2:12-7 to reduce from 9 to 4 the number of the petitions for certification and Appellate Division briefs and appendices to be filed, with the caveat that if the petition is granted, an additional 5 copies of the petition and Appellate Division brief and appendix must be filed. The Committee also proposes corresponding amendments to *R.* 2:12-8 reducing from 9 to 4 the number of the briefs in opposition to certification and Appellate Division briefs and appendices filed.

The Appellate Division Rules Committee supports these proposed amendments.

The proposed amendments to *Rules* 2:6-12, 2:12-7, and 2:12-8 follow.

2:6-12. Number of Briefs, Appendices and Transcripts to Be Served and Filed

(a) ...no change.

(b) On appeal to the Appellate Division, 5 copies of each brief and appendix shall be filed with the clerk of the Appellate Division[, but if the same are printed, counsel shall cause to be prepared and retain an additional 9 copies of the brief and appendix in the event of a further appeal to or certification by the Supreme Court].

(c) ...no change.

(d) ...no change.

Note: Source — *R.R.* 1:7-12(a)(b), 2:7-3, 2:7-4. Paragraphs (a) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended March 22, 1984 to be effective April 15, 1984; paragraphs (b) and (d) amended November 7, 1988 to be effective January 2, 1989; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (b) amended _____ to be effective _____.

2:12-7. Form, Service and Filing of Petition for Certification

(a) ... no change.

(b) Service, Filing and Time. Within 10 days after the filing of the notice of petition for certification or 30 days after the entry of the final judgment, whichever is later, 2 copies of the petition shall be served on each opposing party and [9] 4 copies thereof together with [9] 4 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court. If certification is granted, petitioner shall file 5 additional copies of the petition, and Appellate Division brief and appendix within 10 days following receipt of the order granting certification.

Note: Source — *R.R.* 1:10-9, 1:10-10(a). Paragraph (a) amended March 5, 1974 to be effective immediately; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended January 19, 1989 to be effective February 1, 1989; paragraph (b) amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended _____ to be effective _____.

2:12-8. Respondent's Brief and Petitioner's Reply Brief

The respondent shall, within 15 days of the service of the petition, serve 2 copies of the brief in opposition to certification and file [9] 4 copies thereof together with [9] 4 copies of respondent's Appellate Division brief and appendix with the Clerk of the Supreme Court. The brief shall be direct and concise, shall conform to the applicable provisions of *R.* 2:6 and shall not exceed 20 pages, exclusive of tables of contents, citations and appendix. Within 10 days of such service, the petitioner may serve 2 copies and file [9] 4 copies of a reply brief not exceeding 10 pages, exclusive of tables of contents, citations, and appendix. If certification is granted, each party shall file 5 additional copies of the brief in opposition to certification and Appellate Division brief and appendix within 10 days following receipt of the order granting certification.

Note: Source — *R.R.* 1:10-11, 1:10-12; amended July 14, 1992 to be effective September 1, 1992; amended _____ to be effective _____.

I. Proposed Amendments to *R.* 2:8-1 — Motions

An attorney had suggested that *R.* 1:7-4 be made applicable to Appellate Division motions, *i.e.,* to require that the court include findings of fact and conclusions of law when making a substantive determination. A subcommittee, chaired by Jonathan Weiner, was formed to study this issue. The subcommittee recognized the need, with certain types of motions, for something more than a check-off box indicating whether an appellate court granted or denied the application. Accordingly, the subcommittee proposed that on motions for emergent or injunctive relief, summary disposition, and relief based on the Rules of Professional Conduct, the Appellate Division be required to give a short statement of the reasons for its determination. The rationale behind the proposal is that it will provide the attorney with the information needed to explain the disposition of the motion to the client and to plan an appeal strategy. An alternative proposal limiting the requirement for a statement of reasons to motions that are granted was suggested, but the subcommittee believed that it was just as important to provide a substantive reason when a motion is denied. On a close vote, the Committee voted to recommend that the court provide a statement of reasons. On a separate vote, the Committee voted overwhelmingly not to limit the requirement to the Appellate Division, but to make it applicable to the Supreme Court as well.

The Appellate Division Rules Committee objected to this proposed amendment. It recognized that some motions require a statement of reasons but opposed the requirement for all motions for emergent or injunctive relief, summary disposition, or relief based on the Rules of Professional Conduct because it would be burdensome on the court and because, in its opinion, the decision to include a statement of reasons should remain in the court's discretion. A majority of the Civil Practice Committee reaffirmed its position and voted to submit the rule with its recommended amendments to the Supreme Court.

The proposed amendments to *R.* 2:8-1 follow.

2:8-1. Motions

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) Order and Notice. Unless the court otherwise directs, upon determination of the motion the court or the clerk acting under its direction shall forthwith enter an order granting or denying the motion in accordance with the determination of the court. The court shall briefly state its reasons for the determination on motions seeking (1) emergent or injunctive relief; (2) summary disposition; and (3) relief based on the Rules of Professional Conduct. The clerk [and] shall mail true copies thereof to counsel.

(e) ...no change.

Note: Source — *R.R.* 1:7-10(b), 1:11-1, 1:11-2(a) (b), 1:11-3, 2:11-1, 2:11-2, 2:11-3,4:61-1(c). Paragraph (a) amended, paragraph (c) adopted and former paragraph (c) redesignated (d) July 24, 1978 to be effective September 11, 1978; paragraph (b) amended and paragraph (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) and (d) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended _____ to be effective _____.

J. Proposed Amendments to *R.* 4:14-7 — Subpoena for Taking Depositions

An attorney proposed that, as a matter of convenience, *R.* 4:14-7 (b)(1) be amended to add a phrase permitting the taking of a deposition of a fact witness who is a New Jersey resident at a place in another county not more than 20 miles from that witness's place of residence or employment. Currently, the rule provides that the deposition must take place in the county in which the deponent resides. The Committee agreed with this suggestion, adding the specification that the deposition must take place in New Jersey.

The proposed amendments to *R.* 4:14-7 follow.

4:14-7. Subpoena for Taking Depositions

(a) ...no change.

(b) ...no change.

(1) Fact Witnesses. A resident of this State subpoenaed for the taking of a deposition may be required to attend an examination only at a reasonably convenient time and only (A) in the county of this State in which he or she resides, is employed or transacts business in person[,]; or (B) at a location in New Jersey within 20 miles from the witness's residence or place of business; or (C) at such other convenient place fixed by court order. A nonresident of this State subpoenaed within this State may be required to attend only at a reasonably convenient time and only in the county in which he or she is served, at a place within this State not more than 40 miles from the place of service, or at such other convenient place fixed by court order. The party subpoenaing a witness, other than one subject to deposition on notice, shall reimburse the witness for the out-of-pocket expenses and loss of pay, if any, incurred in attending at the taking of depositions.

(2) ...no change.

(c) ...no change.

Note: Source — *R.R.* 4:20-1, 8 (last sentence), 4:46-4(a)(b). Paragraphs (a) and (b) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) adopted November 5, 1986 to be effective January 1, 1987; paragraph (b) recaptioned paragraph (b)(1) and amended, paragraph (b)(2) adopted and paragraph (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b)(1) amended _____ to be effective _____.

K. Proposed Amendments to *R.* 4:21A-2 — Qualification, Selection, Assignment and Compensation of Arbitrators

The Supreme Court Arbitration Advisory Committee and the Conference of Civil Presiding Judges recommended amending *R.* 4:21A-2(b) to make it clear that the seven years experience requirement to qualify to serve as an arbitrator must be experience gained from practice in New Jersey. The rationale behind the proposed amendment is that arbitrators are presumed to have familiarity not only with the substantive areas of New Jersey law subject to arbitration but also with the how and why of jury awards in the county in which they wish to arbitrate. The Committee endorsed this proposal and recommends amending *R.* 4:21A-2(b) to make it clear that to qualify to serve as an arbitrator, an attorney must have at least seven years of experience in New Jersey in any of the substantive areas of law subject to arbitration.

The proposed amendments to *R.* 4:21A-2 follow.

4:21A-2. Qualification, Selection, Assignment and Compensation of Arbitrators

(a) ...no change.

(b) Appointment From Roster. If the parties fail to stipulate to the arbitrators pursuant to paragraph (a) of this rule, the arbitrator shall be designated by the civil division manager from the roster of arbitrators maintained by the Assignment Judge on recommendation of the arbitrator selection committee of the county bar association. Inclusion on the roster shall be limited to retired judges of any court of this State who are not on recall and attorneys admitted to practice in this State having at least seven years of experience in New Jersey in any of the substantive areas of law subject to arbitration under these rules, and who have completed the training and continuing education required by *R.* 1:40-12(c). The arbitrator selection committee, which shall meet at least once annually, shall be appointed by the county bar association and shall consist of one attorney regularly representing plaintiffs in each of the substantive areas of law subject to arbitration under these rules, one attorney regularly representing defendants in each of the substantive areas of law subject to arbitration under these rules, and one member of the bar who does not regularly represent either plaintiff or defendant in each of the substantive areas of law subject to arbitration under these rules. The members of the arbitrator selection committee shall be eligible for inclusion in the roster of arbitrators. The Assignment Judge shall file the roster with the Administrative Director of the Courts. A motion to disqualify a designated arbitrator shall be made to the Assignment Judge on the date of the hearing.

(c) ...no change.

(d) ... no change.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended

July 10, 1998 to be effective September 1, 1998; caption amended, paragraph (c) amended, and new paragraph (d) adopted July 5, 2000 to be effective September 5, 2000; paragraphs (b) and (d)(1) amended, and former paragraph (d)(3) deleted July 12, 2002 to be effective September 3, 2002; paragraphs (b), (c), (d)(1), and (d)(2) amended July 28, 2004 to be effective September 1, 2004; paragraph (b amended to be effective .

L. Proposed Amendments to *R.* 4:23-4 — Failure of Party to Attend at Own Deposition or Comply with Demand or Respond to Request for Inspection

A Committee member suggested that the caption of *R.* 4:23-4 be shortened to reflect more accurately the content of the rule. The reference in the rule to *R.* 4:18-1 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes; Pre-Litigation Discovery) was deleted in September 2000, and *R.* 4:18 was made subject to the two-step dismissal procedure of *R.* 4:23-5(a) at that time. The Committee supports the proposal to amend the caption to eliminate reference to requests for inspection.

The proposed amendments to *R.* 4:23-4 follow.

4:23-4. Failure of Party to Attend at Own Deposition [or Comply With Demand or Respond to Request for Inspection]

...no change.

Note: Source — *R.R.* 4:27-4. Former rule deleted and new *R.* 4:23-4 adopted July 14, 1972 to be effective September 5, 1972; amended July 5, 2000 to be effective September 5, 2000; caption amended _____ to be effective _____.

M. Proposed Amendments to *Rules* 4:36-3 and 4:46-1 — re: Timing for Filing Summary Judgment Motions

In the 2002-2004 term, the Conference of Civil Presiding Judges recommended amending *R.* 4:46-1 to require that summary judgment motions be made returnable no later than 30 days before the trial date and, in acknowledgement of the State Bar Association's concern regarding the timing of the summary judgment cutoff, amending *R.* 4:36-3 to require a minimum of ten weeks notice of trial. The Judicial Council and the Supreme Court gave conceptual approval to this proposal and the Committee drafted the necessary amendments. Rather than adopting the amendments piecemeal, however, the Court directed the Committee to consider the larger issue of whether there should be a temporal cut-off for making any type of dispositive motion or raising affirmative defenses. This question was referred to the Dispositive Motions Subcommittee, chaired by the Hon. Marianne Espinosa. The conclusions of that subcommittee with respect to the expanded charge are set forth in summary fashion in Section II. G. of the Report, and in detail in the Appendix, which contains the full text of the subcommittee's report.

The Dispositive Motions Subcommittee also considered anew the limited, original issue of whether there should be changes to the Court Rules to impose a deadline for the filing of summary judgment motions at a point prior to trial. The reasons supporting such a deadline are to protect the credibility and certainty of the trial date, thus avoiding the situation in which the filing of a summary judgment motion returnable on the eve of trial would cause the trial date to be adjourned, and to give attorneys notice of a decision on a summary judgment motion in advance of the time for intense trial preparation. Those opposed to the imposition of a deadline argued that parties are unlikely to consider a matter ripe for summary judgment until an arbitration or trial notice is issued, thus leaving a short period of time before trial in which to file

such a motion. To alleviate the pressure caused by the short time frame, the subcommittee recommended that *R.* 4:36-3(a) be amended to require a minimum of ten weeks notice of trial (increased from the current eight weeks minimum). The subcommittee also recommended that *R.* 4:46-1 be amended to provide that, in cases assigned to Tracks I, II, and III, summary judgment motions must be made returnable at least 30 days prior to the actual trial date and may not be heard otherwise except for good cause shown. The requirement would not apply to cases assigned to Track IV, cases that are actively being case managed regardless of track assignment, and matters in the Chancery Division. The Committee endorsed these proposals, but chose to use the term "scheduled" trial date instead of "actual" trial date.

See Section II. G. of this Report for a discussion of other proposals of the Dispositive Motions Subcommittee, which the Committee considered and rejected. See also the Appendix to this Report for the full report of the Dispositive Motions Subcommittee.

As a housekeeping amendment, the Committee proposes the deletion of the last sentence of *R.* 4:36-3, in recognition of the fact that at this time, every trial has been noticed after 2000.

The proposed amendments to *R.* 4:36-3 and *R.* 4:46-1 follows.

4:36-3. Trial Calendar

(a) Notice of Trial. The court shall advise all parties of the initial trial date no less than [eight] ten weeks prior thereto. Cases scheduled for trial shall be ready to proceed on the initial trial date. If a case is not reached during the week in which the trial date falls, it shall be forthwith scheduled for a date certain after consultation with counsel provided, however, that no case shall be relisted for trial sooner than four weeks from the initial trial date without agreement by all counsel. The court shall issue written notice confirming the new trial date. [This provision shall be applicable to all cases noticed for trial after September 5, 2000.]

(b) ...no change.

(c) ...no change.

Note: Adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (c) adopted September 12, 2000 to be effective immediately; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended _____ to be effective _____.

4:46-1. Time for Making, Filing, and Serving Motion

A party seeking any affirmative relief may, at any time after the expiration of 35 days from the service of the pleading claiming such relief, move for a summary judgment or order upon all or any part thereof or as to any defense. Said motion shall, however, be returnable no later than 30 days before the scheduled trial date, unless the court otherwise orders for good cause shown.. A party against whom a claim for such affirmative relief is asserted may move at any time for a summary judgment or order as to all or any part thereof. Except as otherwise provided by *R.* 6:3-3 (motion practice in Special Civil Part) or unless the court otherwise orders, a motion for summary judgment shall be served and filed not later than 28 days before the time specified for the return date; opposing affidavits, certifications, briefs, and cross-motions for summary judgment, if any, shall be served and filed not later than 10 days before the return date; and answers or responses to such opposing papers or to cross-motions shall be served and filed not later than 4 days before the return date. No other papers may be filed without leave of court.

Note: Source — *R.R.* 4:58-1, 4:58-2. Caption and text amended November 1, 1985 to be effective January 2, 1986; amended November 5, 1986 to be effective January 1, 1987; amended November 7, 1988 to be effective January 2, 1989; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; amended _____ to be effective _____.

N. Proposed Amendments to *R.*4:59-1 — Execution

An attorney for Legal Services of New Jersey advised that under the current rule *R.* 4:42-11 (Interest; Rate on Judgments; in Tort Actions), it is difficult to detect how interest has been calculated and whether appropriate credits have been applied to the principal. Specifically, he could not determine whether interest is being compounded by adding accrued interest to the principal or whether there has been a miscalculation of simple interest based on a principal amount that has not been reduced to reflect partial payments. Furthermore, he claimed that the information provided to the court and to the judgment creditor is insufficient to determine whether partial payments have been credited and whether interest has been calculated after the principal balance has been reduced by the partial payments. He suggested that this Committee and the Special Civil Part Practice Committee work together to study the current practice and available safeguards. He asked the Committee to consider the proposal that *R.* 4:42-11 be amended to specify the proper method for calculating post-judgment interest following partial payments, and to require a full accounting, including all partial payments and interest calculations, in all applications for writs and applications for additional interest.

Melville D. Miller, Director of Legal Services of New Jersey and a Committee member, expressed the view that there was no need for a joint committee, that the rule was clear, and that there was no need for amendments. He characterized the failure to credit partial payments as a calculation issue. He proposed that the post-judgment interest rule be amended to require that the request for judgment include an affidavit of calculation, including all partial payments. Judge Pressler suggested that the default judgment rule, *R.* 4:43, be similarly amended. Donald Phelan, Clerk of the Superior Court and Committee member, advised that the affidavit should be included with the application for a writ, rather than with the judgment. The Committee agreed

that the problem should be addressed in the application for a writ under *R.* 4:59-1 rather than in *R.* 4:42-11, as suggested in the original proposal.

Accordingly, with the specific support of the Clerk of the Superior Court and the Director of Legal Services of New Jersey, the Committee proposes amendments to *R.* 4:59-1 to 1) clarify that the endorsement on an application for a writ should explain in detail the method of calculation and should demonstrate that all partial payments have been credited to the principal balance, and 2) provide that a copy of the writ with the endorsement shall be served on the defendant.

It was also noted that some attorneys are taking the position that the language in the comment to *R.* 4:59-1 regarding the material to be included in the order for wage execution applies only to the Special Civil Part and not to the Civil Part. With reference to the amendment of paragraph (d), the comment to the court rule states:

> The amendment also requires the order for wage execution to direct the employer to provide a copy thereof to the defendant and to include the post-issuance objection and reduction rights contained in the notice of wage execution. Note the conforming revisions then made in Appendices XI-I and XI-J. *Rules Governing the Courts of New Jersey,* Gann Publisher at 1863.

Appendices XI-I and XI-J are the forms for the Notice of Application for Wage Execution and the Wage Execution itself for use in the Special Civil Part where the process to obtain an order and execution is condensed into one step. Thus, information about post-issuance objection and reduction rights necessarily must be contained in the order. However, in the Civil Part there it is a two-step process that provides, first, for an order allowing the issuance of the writ and, second, for the issuance of the writ by the clerk in response to the mandate of the order. The attorneys take the position that since the writ already contains information about post-issuance objection and reduction rights (see *R.* 4:59-1(d)) it is unnecessary for the order to

contain the same information. The comment cited above indicates otherwise. To correct this misapprehension, the Committee agreed that it should be made clear that the forms in Appendices XI-I and XI-J are applicable in both parts.

It was further suggested that, for purposes of finality, a time limit within which the judgment debtor must be notified of the issuance of a writ of execution be added to the proposed amendments to *R.* 4:59-1. The Committee agreed and recommends an amendment incorporating a 10-day time period within which such notification must take place.

The proposed amendments to *R.* 4:59-1 follow.

4:59-1. Execution

(a) In General. Process to enforce a judgment or order for the payment of money and process to collect costs allowed by a judgment or order, shall be a writ of execution, except if the court otherwise orders or if in the case of a *capias ad satisfaciendum* the law otherwise provides. The amount of the debt, damages, and costs actually due and to be raised by the writ, together with interest from the date of the judgment, shall be endorsed thereon by the party at whose instance it shall be issued before its delivery to the sheriff or other officer. The endorsement shall explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant. A copy of the fully endorsed writ shall be served, personally or by ordinary mail, upon the judgment-debtor after a levy on the debtor's property has been made by the sheriff or other officer and in no case less than 10 days prior to turnover of the debtor's property to the creditor pursuant to the writ. Unless the court otherwise orders, every writ of execution shall be directed to a sheriff and shall be returnable within 24 months after the date of its issuance, except that in case of a sale, the sheriff shall make return of the writ and pay to the clerk any remaining surplus within 30 days after the sale, and except that a *capias ad satisfaciendum* shall be returnable not less than 8 and not more than 15 days after the date it is issued. One writ of execution may issue upon one or more judgments or orders in the same cause. The writ may be issued either by the court or the clerk thereof.

(b) ...no change.

(c) ...no change.

(d) Wage Executions; Notice, Order, Hearing. Proceedings for the issuance of an execution against the wages, debts, earnings, salary, income from trust funds or profits of a judgment-debtor shall comply with the requirements of paragraph (a) of this rule and shall be on

notice to the debtor. The notice of wage execution shall state (1) that the application will be made for an order directing a wage execution to be served upon the defendant's named employer, (2) the limitations prescribed by 15 U.S.C.A. §§ 1671-1677, inclusive and N.J.S. 2A:17-50 *et seq.* and N.J.S. 2A:17-57 *et seq.* on the amount of defendant's salary which may be levied upon, (3) that defendant may notify the court and the plaintiff in writing within ten days after service of the notice of reasons why the order should not be entered, (4) if defendant so notifies the clerk, the application will be set down for hearing of which the parties will receive notice as to time and place, and if defendant fails to give such notice, the order will be entered as of course, and (5) that defendant may object to the wage execution or apply for a reduction in the amount withheld at any time after the order is issued by filing a written statement of the objection or reasons for a reduction with the clerk and sending a copy to the creditor's attorney or directly to the creditor if there is no attorney, and that a hearing will be held within seven days after filing the objection or application for a reduction. The judgment-creditor may waive in writing the right to appear at the hearing on the objection and rely on the papers. The notice of wage execution shall be served on the judgment-debtor in accordance with *R.* 1:5-2. A copy of the notice of application for wage execution, together with proof of service in accordance with *R.* 1:5-3, shall be filed with the clerk at the time the form of order for wage execution is submitted. No order shall be entered unless the form of order was filed within 45 days of service of the notice or 30 days of the date of the hearing. The writ shall include a provision directing the employer immediately to give the judgment-debtor a copy thereof and it shall also include a provision that the judgment-debtor may, at any time, notify the clerk and the judgment-creditor in writing of reasons why the levy should be reduced or discontinued. If an objection from the judgment-debtor is received by the clerk after a wage execution has issued, all moneys remitted

by the employer shall be held until further order of the court and the matter shall be set down for a hearing to be held within seven days of receipt of the objection.

(e) ...no change.

(f) ...no change.

(g) ...no change.

(h) Use of the forms in Appendix XI G through R inclusive shall be mandatory in all courts, including the Special Civil Part.

Note: Source — *R.R.* 4:74-1, 4:74-2, 4:74-3, 4:74-4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b), (c), (d), and (e) redesignated (c), (d), (e) and (f) respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21, 1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (c), (e), (f), and (g) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended June 28, 1996 to be effective June 28, 1996; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (e), and (g) amended July 5, 2000 to be effective September 5, 2000; paragraph (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (d) amended, and new paragraph (h) added to be effective _____.

O. Proposed Amendments to *R.* 4:82 — Matters in Which the Surrogate's Court May Not Act

A Surrogate noted that a recent amendment to *N.J.S.A.* 3B:3-19 (Probate Code) states: "A writing intended as a will may be admitted to probate only in the manner provided by the Rules Governing the Courts of the State of New Jersey." He requested that the Committee consider amending the rules to address the admission into probate of writings intended as wills. The Committee agreed that the rules as currently constituted do not address the need for solemn judicial probate for a "writing intended as a will" as defined by *N.J.S.A.* 3B:3-2(b) or *N.J.S.A.* 3B:3-3, and determined that the rules should be amended to make clear that these are matters within the jurisdiction of the Superior Court, specifically, the Chancery Division, Probate Part. Accordingly, the Committee recommends amending *R.* 4:82 to include these specific items in the list of matters in which the Surrogate's court may not act.

The proposed amendments to *R.* 4:82 follow.

4:82. Matters in Which the Surrogate's Court May Not Act

Unless specifically authorized by order or judgment of the Superior Court, and then only in accordance with such order or judgment, the Surrogate's Court shall not act in any matter in which (1) a caveat has been filed with it before the entry of its judgment; (2) a doubt arises on the face of a will or a will has been lost or destroyed; (3) the application is to admit to probate a writing intended as a will as defined by *N.J.S.A.* 3B:3-2(b) or *N.J.S.A.* 3B:3-3; [(3)] (4) the application is to appoint an administrator *pendente lite* or other limited administrator; [(4)] (5) a dispute arises before the Surrogate's Court as to any matter; or [(5)] (6) the Surrogate certifies the case to be of doubt or difficulty.

Note: Source — *R.R.* 5:3-3(a). Former *R.* 4:84-1(d) amended July 22, 1983, to be effective September 12, 1983; amended and redesignated as *R.* 4:82 June 29, 1990 to be effective September 4, 1990; amended June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

P. Proposed Housekeeping Amendments

The Committee proposes "housekeeping" amendments to the following rules:

R. 1:5-4 — to move the language concerning when service is deemed complete to the appropriate section of the rule.

R. 1:6-7 — to conform the language of *R.* 1:6-7 to that of *R.*1:6-2 regarding notification to the court if a motion is withdrawn or the matter settled.

R. 1:7-1 — to eliminate an outdated reference to a pretrial order.

*R.*1:11-2 — to eliminate outdated references to a pretrial conference.

R. 2:5-3 — to eliminate an outdated reference to the provision of a "carbon copy" of the transcript to the court. The Appellate Division Rules Committee supports this amendment.

R. 4:74-7 — for the sake of consistency, to delete the word "mental" from "mental patient" in subsection (f) as all similar references throughout the rule are simply to the "patient.".

R. 4:78 — to replace an outdated reference to the Department of Labor and Industry with the name by which the department is now known, the Department of Labor and Workforce Development.

The proposed amendments to these rules follow.

1:5-4. Service by Mail or Courier: When Complete

(a) Service by Ordinary Mail if Registered or Certified Mail Is Required and Is Refused. Where under any rule, provision is made for service by certified or registered mail, service may also be made by ordinary mail simultaneously or thereafter, unless simultaneous service is required under these rules. [If service is simultaneously made by ordinary mail and certified or registered mail, service shall be deemed complete on mailing of the ordinary mail. If service is not made simultaneously and the addressee accepts the certified or registered mail, service shall be deemed complete on the date of the acceptance. If the addressee fails to claim or refuses to accept delivery of certified or registered mail, service shall be deemed complete on mailing of the ordinary mail.]

(b) Service Complete on Mailing. Except for motions that are governed by *R.* 1:6-3(c), service by mail of any paper referred to in *R.* 1:5-1, when authorized by rule or court order, shall be complete upon mailing of the ordinary mail. If no ordinary mailing is made, service shall be deemed complete upon the date of acceptance of the certified or registered mail. If service is simultaneously made by ordinary mail and certified or registered mail, service shall be deemed complete on mailing of the ordinary mail. If service is not made simultaneously and the addressee accepts the certified or registered mail, service shall be deemed complete on the date of the acceptance. If the addressee fails to claim or refuses to accept delivery of certified or registered mail, service shall be deemed complete on mailing of the ordinary mail.

(c) ...no change.

Note: Source — *R.R.* 4:5-2(a) (fifth sentence). Paragraph (a) adopted and former rule designated (b) June 29, 1973 to be effective September 10, 1973; amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended and paragraph (c) added July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 10, 1998 to be effective September 1,

1998; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) and (b) amended _____ to be effective _____.

1:6-7 Reading of Moving Papers and Briefs in Advance

Insofar as possible judges shall read moving papers and briefs in advance of the hearing and to this end, when briefs are submitted in the trial courts, the matter shall be assigned insofar as possible to the judge in advance of the hearing. The parties shall promptly advise the court if a motion is withdrawn or the matter [has been disposed of by settlement] settled prior to the hearing date.

Note: Source — *R.R.* 1:30-1; amended _____ to be effective _____.

1:7-1. Opening and Closing Statement

(a) ...no change.

(b) Closing Statement. After the close of the evidence and except as may be otherwise [provided in the pretrial order] ordered by the court, the parties may make closing statements in the reverse order of opening statements. In civil cases any party may suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum. In the event such comments are made to a jury, the judge shall instruct the jury that they are argument only and do not constitute evidence.

Note: Source — *R.R.* 3:7-3, 4:44-1, 7:8-4; former rule redesignated as paragraph (a), paragraph (b) adopted and caption amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 12, 2002 to be effective September 3, 2002; paragraph (b) amended _____ to be effective _____.

1:11-2. Withdrawal or Substitution

(a) Generally. Except as otherwise provided by *R.* 5:3-5(d) (withdrawal in a civil family action),

(1) prior to the entry of a plea in a criminal action or prior to the [earlier of the pretrial conference or the] fixing of a trial date in a civil action, an attorney may withdraw upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear pro se. If the client will appear pro se, the withdrawing attorney shall file a substitution. An attorney retained by a client who had appeared pro se shall file a substitution, and

(2) after the entry of a plea in a criminal action or the [earlier of the pretrial conference or] fixing of a trial date in a civil action, an attorney may withdraw without leave of court only upon the filing of the client's written consent, a substitution of attorney executed by both the withdrawing attorney and the substituted attorney, a written waiver by all other parties of notice and the right to be heard, and a certification by both the withdrawing attorney and the substituted attorney that the withdrawal and substitution will not cause or result in delay.

(b) ...no change.

Note: Source — *R.R.* 1:12-7A; amended July 16, 1981 to be effective September 14, 1981; amended November 7, 1988 to be effective January 2, 1989; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; amended and paragraph designations and captions added January 21, 1999 to be effective April 5, 1999; paragraphs (a)(1) and (2) amended to be effective .

2:5-3. Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

(a) Request for Transcript; Prescribed Form. Except as otherwise provided by *R.* 2:5-3(c), if a verbatim record was made of the proceedings before the court, agency or officer from which the appeal is taken, the appellant shall, no later than the time of the filing and service of the notice of appeal, serve a request for the preparation of an original and copy of the transcript, as appropriate, (1) upon the reporter who recorded the proceedings and upon the reporter supervisor for the county if the appeal is from a judgment of the Superior Court, or (2) upon the clerk of the court if the appeal is from a judgment of the Tax Court or a municipal court, or (3) upon the agency or officer if the appeal is from administrative action. The appellant may, at the same time, order from the reporter, court clerk, or agency the number of additional copies required by *R.* 2:6-12 to file and serve. If the appeal is from an administrative agency or officer which has had the verbatim record transcribed, such transcript shall be made available to the appellant on request for reproduction for filing and service. The request for transcript shall state the name of the judge or officer who heard the proceedings, the date or dates of the trial or hearing and shall be accompanied by a deposit as required by *R.* 2:5-3(d). The request for transcript shall be in a form prescribed by the Administrative Director of the Courts. A copy of the request for transcript shall be mailed to all other interested parties and to the clerk of the appellate court. The provisions of this paragraph shall not apply if the original and [first carbon] copy of the transcript have already been prepared and are on file with the court.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) ...no change.

Note: Source — *R.R.* 1:2-8(e) (first, second, third, fourth, sixth and seventh sentences), 1:2-8(g), 1:6-3, 1:7-1(f) (fifth sentence), 3:7-5 (second sentence), 4:44-2 (second sentence), 4:61-1(c), 4:88-8 (third and fourth sentences), 4:88-10 (sixth sentence). Paragraphs (a)(b)(c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (b) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; caption amended and paragraph (a) caption and text amended July 24, 1978 to be effective September 11, 1978; paragraphs (c) and (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (d) caption and text amended, former paragraph (e) redesignated paragraph (f), and paragraph (e) caption and text adopted November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (e) amended _____ to be effective _____.

4:74-7. Civil Commitment — Adults

(a) ...no change.

(b) ...no change.

(c) ...no change.

(e) ...no change.

(f) Final Order of Commitment, Review.

(1) ...no change.

(2) Review. The order shall provide for periodic reviews of the commitment no later than (1) three months from the date of the first hearing, and (2) nine months from the date of the first hearing, and (3) 12 months from the date of the first hearing, and (4) at least annually thereafter, if the patient is not sooner discharged. The court may schedule additional review hearings but, except in extraordinary circumstances, not more than once every 30 days. If the court determines at a review hearing that involuntary commitment shall be continued, it shall execute a new order. All reviews shall be conducted in the manner required by paragraph (e) of this rule except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration of two years from the date of judgment may be summary, provided all parties in interest are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no more than three months prior thereto. The court may, in its discretion, at a review hearing, where the advanced age of the [mental] patient or where the cause or nature of the mental illness renders it appropriate, and where it would be impractical to obtain the testimony of a psychiatrist (as required in paragraph (e)), support its findings by the oral testimony of a physician on the patient's treatment team who has personally conducted an examination of the patient as close to the hearing date as possible,

but in no event more than five days prior to the hearing date. A scheduled periodic review, as set forth above, shall not be stayed pending appeal of a prior determination under this rule.

(g) ...no change.

(h) ...no change.

(i) ...no change.

(j) ...no change.

Note: Source-paragraphs (a) (b) (c) (d) (e) (f) and (g), captions and text deleted and new text adopted July 17, 1975 to be effective September 8, 1975; paragraphs (a), (b), (c), (e), (f) amended and (j) caption and text deleted and new caption and text adopted September 13, 1976, to be effective September 13, 1976; paragraphs (b), (d), and (f) amended July 24, 1978, to be effective September 11, 1978; paragraph (f) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; paragraphs (e) and (f) amended and paragraphs (g) and (h) caption and text amended November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended, subparagraphs (b)(1) and (2) adopted, paragraphs (c), (d) and (e) amended, caption and text of paragraph (f) amended, and caption and text of subparagraphs (g)(1) and (2) amended November 7, 1988 to be effective immediately; November 7, 1988 amendments rescinded February 21, 1989 retroactive to November 7, 1988; November 7, 1988 amendments reinstated June 6, 1989 to be effective June 7, 1989; subparagraph (c)(2) amended June 6, 1989 to be effective June 7, 1989; paragraph (g) recaptioned and text adopted and paragraphs (g) (h) (i) and (j) redesignated (h) (i) (j) and (k) June 29, 1990 to be effective September 4, 1990; paragraphs (c), (e) and (g) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2), (c)(1) and (4), (e), (f), (h)(2), (i)(1) and (2)and (k) amended July 13, 1994 to be effective September 1, 1994; amended January 22, 1997 to be effective March 1, 1997; paragraph (f)(2) amended _____ to be effective _____.

4:74-8. Notice of Appeal From Wage Collection Section

The notice of appeal from any judgment obtained in the Wage Collection Section of the Wage and Hour Bureau of the Department of Labor and [Industry] Workforce Development shall be filed in the office of the deputy clerk of the Superior Court in the county in which the subject employment is located and shall briefly describe the judgment and state that the party appeals therefrom. Either party may bring on the hearing of the appeal upon 10-days' notice to the other party.

Note: Source — *R.R.* 5:2-9. Amended November 22, 1978 to be effective December 7, 1978; amended July 22, 1983 to be effective September 12, 1983; amended June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to *R.* 1:7-4 — Findings by the Court in Non-Jury Trials and on Motions

An attorney pointed out that the last sentence in *R.* 1:7-4, "Motions for reconsideration of interlocutory orders shall be determined pursuant to *R.* 4:42-2," refers to the rule dealing with judgment upon multiple claims, and suggested that the reference should instead be to *R.* 4:49-2 (Motion to Alter or Amend a Judgment or Order).

The Committee concluded that the rule as written is correct, noting that the reference in *R.* 1:7-4 to *R.* 4:42-2 clarifies that motions for reconsideration of interlocutory orders are specifically exempted from the time constraints associated with final orders.

B. Proposed Amendments to *R.* 1:21-7 — Contingent Fees

In response to an attorney's inquiry regarding the computation of contingency fees where an attorney accepts representation on a contingency fee basis of one litigant in several cases that are subsequently consolidated by the court, the Committee agreed that where there is one client and one attorney the contingency fee should be calculated on the aggregate verdict in the consolidated cases. Such conclusion is clear from the overall scheme of the court rules. Accordingly, the Committee determined that no change to the rule was necessary.

C. Proposed Amendments to *R.* 2:2-4 — Appeals to the Appellate Division from Interlocutory Orders, Decisions or Actions

At the time that the Committee was considering an amendment to clarify that appeals from orders granting the late filing of a notice of tort claim should be considered final decisions for purposes of appeal (See Section I. F., *supra*), it was suggested that orders disqualifying trial counsel ought to be similarly characterized. The Committee was of the opinion that a sentence stating that "motions for leave to appeal from orders disqualifying trial counsel should be liberally granted" should be added to *R.* 2:2-4. It included this proposed amendment for consideration by the Appellate Division Rules Committee, (ADRC).

The ADRC objected to the proposed language in *R.* 2:2-4 that motions for leave to appeal from an order disqualifying trial counsel shall be "freely granted." The ADRC believed that there is no need to identify categories of orders from which leave to appeal should be freely granted or to create a hierarchy of such motions and that the determination on a motion for leave to appeal should be left to the discretion of the court under the current standard of "the interests of justice."

The Civil Practice Committee then considered an alternative proposal to amend *R.* 2:2-3(a) to add "orders disqualifying trial counsel" to the limited list of orders that would be considered final for purposes of appellate review. There was also some discussion of making such an order eligible for appeal by motion for summary disposition. On a vote, 7 members of the Committee voted to recommend the originally proposed amendments to *R.* 2:2-4 to the Supreme Court, 9 voted to recommend an amendment to *R.* 2:2-3 making the order eligible for appeal, and 18 voted to accept the Appellate Division's position. Accordingly, the Committee has withdrawn its proposal to amend *R.* 2:2-4.

D. Proposed Amendments to *R.* 2:5-3 — Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

An attorney suggested an amendment to *R.* 2:5-3 to clarify what must be provided as part of the record on an appeal from a motion. The request was based on the attorney's reading of the opinion in *Newman v. Isuzu Motors America,* 367 *N.J. Super.* 141, 144-145 (App. Div. 2004), in which the court criticized the appellant for not providing the transcript of a motion for reconsideration that resulted in a subsequent written decision by the motion judge.

The Committee members discussed the advisability of adding language to the court rule, but concluded that, under a common sense approach, any attorney who felt a transcript was necessary for the court's understanding of the case would order it. Accordingly, the Committee determined that there was no need for an amendment to the rule at this time.

See Section I. P. of this Report for a proposed housekeeping amendment to this rule, which the Committee recommends.

E. Proposed Amendments to *R.* 2:6-1 — Preparation of Appellant's Appendix; Joint Appendix; Contents

An attorney requested that language be added to *R.* 2:6-1(d) to provide for a specific enforcement procedure to be followed when counsel cannot agree on the preparation or cost of a joint appendix.

The Committee declined to graft enforcement language onto the rule, reasoning that attorneys have sufficient remedies within the existing rule structure to address this situation, should it arise.

F. Proposed Amendments to *R.* 4:5B-2 — Case Management Conferences

The Supreme Court in *Ferreira v. Rancocas Orthopedic Associates,* 178 *N.J.* 144, 147 (2003) mandated that an accelerated case management conference be held within 90 days of the service of an answer in all professional malpractice actions. The Committee discussed whether *R.* 4:5B-2 should be amended to include this mandate. Currently, the requirement is mentioned and the case is cited in the comments to *Rules* 4:5-8 and 4:5B-1.

After a lengthy discussion, the Committee decided against including such a requirement in the court rule. The members were concerned that particularizing the rule to incorporate the terms of the New Jersey Medical Care Access and Responsibility and Patients First Act would not only open the Committee to requests for inclusion of other legislative mandates, but would also contravene the basic policy of the court rules being rules of general, not specific, application. Accordingly, the Committee declined to recommend an amendment to the rule.

G. Proposed Amendments to *Rules* 4:6-2, 4:6-3, and 4:6-7 — re: Failure to State a Claim on Which Relief Can Be Granted

In the 2002-2004 rules cycle, a judge had sought clarification as to when and how the defense of failure to state a claim upon which relief can be granted must be presented. It was his position that *Rules* 4:6-2, 4:6-3, and 4:6-7 were internally inconsistent and that clarification was necessary. The Committee considered and rejected the suggestion for clarifying rule amendments, opining that the language of the rules is clear and internally consistent.

An attorney, commenting on the rejection of the proposed rule amendment regarding these rules in 2004, urged the Committee to revisit its position in which it found no internal inconsistency among the rules. He detailed the apparent timing conflict among the rules, *i.e.* *R.* 4:6-2 provides that a motion to dismiss for failure to state a claim must be filed before a responsive pleading, whereas *R.* 4:6-3 provides that such a motion shall be heard before trial or at trial (*R.* 4:6-7). He suggested that the Committee consider an amendment to *R.* 4:6-2 to incorporate the provisions of Federal Rule 12(c), which distinguishes a motion for failure to state a claim upon which relief can be granted from a motion for judgment on the pleadings. This issue was referred to the Dispositive Motions Subcommittee and it was subsumed into its consideration of whether deadlines should be established for filing certain dispositive motions.

Hon. Marianne Espinosa, subcommittee chair, reported initially that the subcommittee was experiencing difficulty in identifying the types of motions for which a deadline might be appropriate or desirable. Judge Pressler suggested that the subcommittee concentrate on the problem presented by the failure to raise a dispositive defense until the conclusion of discovery and the commencement of trial.

After further deliberation, the subcommittee submitted a report, noting at *R.* 4:6-2 provides that motions regarding lack of subject matter jurisdiction (subsection (a)) are nonwaivable and may be raised at any time and motions regarding personal jurisdiction and sufficiency of process (subsections (b), (c), and (d)) are waived if not raised by motion within 90 days after service of the answer The defenses of failure to state a claim (subsection (e)) and failure to join a necessary party (subsection (f)) may be made in any pleading permitted or ordered, or by motion for summary judgment or at the trial on the merits, *R.* 4:6-7. The subcommittee noted that a number of Appellate Division cases have supported the application of equitable relief in matters in which dispositive motions had been withhold. It also observed that the requirement that affidavit of merit conferences be held would obviate the risk that affidavit of merit motions would be filed unduly late in the litigation. The consensus of the subcommittee was that particular timing issues can be addressed adequately on a case by case basis and that, accordingly, there was no necessity for rule amendments. The Committee agreed there should be no changes *R.* 4:6-2 to incorporate a deadline for the filing of dispositive motions or to require that all defenses be raised in a single motion.

See Section I. M. of this Report for other proposed amendments regarding the timing of summary judgment motions, which the Committee recommends. See also the full report of the Dispositive Motions Subcommittee, contained in the Appendix of this Report.

H. Proposed Amendments to *R.* 4:14-9 — Videotaped Depositions

An attorney suggested that a provision be added to *R.* 4:14-9 providing that, absent the consent of all the parties, *de bene esse* depositions of experts be taken during regular business hours, rather than before or after the business day. He noted that the experts are provided with sufficient notice to arrange their schedules to accommodate the deposition and that permitting a paid witness to dictate when a deposition can take place imposes a strain on attorneys and their families.

The Committee concluded that no rule amendment is necessary, reasoning that the parties have an obligation to cooperate in setting a mutually agreeable time for depositions. The Committee further noted that *R.* 4:14-2(a) already provides that depositions should be scheduled in a manner "reasonably convenient for all parties."

I. Proposed Amendments to *R.* 4:17 — Interrogatories to Parties

An attorney suggested three amendments regarding the answers to uniform interrogatories:

1. The attorney asserted that it has become common practice for parties to precede interrogatory answers with pages of boilerplate objections. This leaves the recipient of the answers unsure as to whether any of the general objections apply to a specific answer. It was suggested that the rule be amended to require that information or documents be specifically identified when withheld in answer to a specific interrogatory, in order to discourage the practice of general boilerplate objections. The practitioners on the Committee did not see this as a problem that would require a rule amendment at this time, and the Committee declined to recommend the proposed change.

2. To address the situation in which a defendant states in an answer to an interrogatory that he or she is unaware of any particular action taken or review conducted, but leaves open the question of whether the attorney has such knowledge, it was suggested that the rule be amended to clarify that the answers to the interrogatories are to include all information in the possession of the party and the party's attorney(s).

   The Committee vigorously opposed this suggestion, observing that the Rules of Professional Conduct, specifically RPC 3.3, address this situation.

3. Because insurance companies often conduct surveillance of a plaintiff but keep that information from defense counsel unless it is helpful to the defense's position, it was suggested that the rule be amended to impose an obligation on

defense counsel to make continual inquiry of the insurance company to ascertain that no surveillance films, stills or the like are in the insurer's possession and that the interrogatory be answered accordingly.

The Committee noted that the attorneys can always ask about the existence of tapes and concluded that this is not a problem that requires a rule amendment.

J. Proposed Amendments to *R.* 4:17-4 — Form, Service and Time of Answers

A Committee member had observed that even though *R.* 4:17-4(e) requires the provision of reports from treating physicians upon request, the accepted practice is to allow a treating physician to offer opinion testimony at trial on any subject relevant to the evaluation and treatment of a patient, even in the absence of a report. In some instances, the treating physician's opinions may come as a surprise at trial. It was suggested that the Committee consider whether the rules should insist on the need for a treating physician's report when that physician will be called to testify at trial.

The Committee members discussed whether a treating physician should be dealt with as an expert witness, subject to all the rules and regulations governing experts. They decided that it would not be wise to eliminate the distinction between treating physicians and experts. Further, they noted that under the rules as currently constituted, the trial judge has discretion to order the treating physician to submit a report and/or to prohibit a physician from testifying if an ordered report is not furnished.

Accordingly, the Committee concluded that there is no need to amend the rule to insist on the provision of a report by the treating physician.

K. Proposed Amendments to *R.* 4:17-8 — Use, Filing and Effect of Interrogatories

An attorney suggested that the last sentence of *R.* 4:17-8 (a), "Interrogatories shall not be marked into evidence without good cause," be amended to make it clear that neither the interrogatories themselves nor any answers thereto will be admitted into evidence without good cause.

The Committee agreed that inclusion of answers is implicit in the rule as currently constituted and concluded that there was no need to amend the rule.

L. Proposed Amendments to *R.* 4:18-1 — Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes; Pre-Litigation Discovery

A Committee member noted an apparent inconsistency in the discovery rules in that *R.* 4:18-1 allows 35 days in which to respond to a request for documents, while the other discovery rules require a response within 30 days, and suggested that the time periods be made consistent. Judge Pressler pointed out that the rule is internally consistent because a demand for production of documents may be served at the same time as a complaint. As a defendant has 35 days in which to answer the complaint, a similar time frame for response to a demand for production of documents is logical.

Accordingly, the Committee determined that no change to the rule should be made.

M. Proposed Amendments to *R.* 4:21A-4 — Conduct of Hearing

A Civil Presiding Judge had proposed that explicit language be added to *R.* 4:21A-4 to clarify that the requirement of an appearance on behalf of each party may be satisfied by the presence of counsel.

The Committee members were of the opinion that the rule was sufficiently clear and that no change to the rule was necessary.

N. Proposed Amendments to *R.* 4:23-5 — Failure to Make Discovery

Two amendments to *R.* 4:23-5 were proposed:

1. An attorney suggested that the rule is applied differently to plaintiffs and defendants in what is required for a final determination in a case where discovery requests have not been complied with. After the 90-day period has run following a dismissal without prejudice for failure to make discovery, defendants need only to move to dismiss a complaint with prejudice to bring finality to the case. Plaintiffs, especially those seeking judgment on liquidated sums, must file three motions – a motion to strike the answer without prejudice, a motion to strike the answer with prejudice, and a motion to enter judgment. The attorney suggested that the rule be amended to permit a plaintiff seeking judgment on a liquidated sum to file a motion to enter judgment instead of or simultaneously with a motion to strike the answer with prejudice, once the 90-day period has run.

   The Committee, hearing the experiences of the practitioners on its roster, concluded that the rule was not onerous as currently constituted and, in fact, works well. Accordingly, no change to the rule is recommended.

2. An attorney noted that *R.* 4:23-5 specifically authorizes the trial court to exclude the testimony of an expert whose report is not furnished as requested pursuant to *R.* 4:17-4(a). The rule is silent, however, as to sanctions for failure to provide an expert report requested as part of a notice to produce documents pursuant to *R.* 4:18-1. The attorney suggested an amendment to *R.* 4:23-5(b) to authorize the exclusion of expert testimony when a report has been demanded as part of a *R.* 4:18-1 document request and not provided.

After a lengthy discussion, the Committee members decided not to amend this rule, reasoning that there was no problem with the rule as currently constituted and that an amendment such as the one suggested would create the potential for confusion, when the usual way to obtain an expert's report is through interrogatories (*R.* 4:17-4), not a document demand (*R.*4:18-1).

O. Proposed Amendments to *R.* 4:49-1 — Motion for New Trial

The New Jersey Medical Care Access and Responsibility and Patients First Act was signed into law on June 7, 2004. Section 9 of the Act refers to the judge's responsibility to consider the evidence in a light most favorable to the moving party when a motion for *additur* or *remittitur* on the quantum of damages has been made pursuant to *R.* 4:49-1. The matter was referred to the Civil Practice Committee for a recommendation on whether this is a matter for a court rule and, if so, to propose language accordingly. It was the view of the Committee that case law standards and practical application of the current state of the law adequately address situations where motions for *additur* or *remittitur* may be granted. Furthermore, because the Court Rules are rules of general application, historically the Committee has been reluctant to recommend rule amendments to implement the provisions of a specific piece of legislation. Accordingly, the Committee determined that no rule amendment is necessary to implement the legislative intent of this section. Because Section 9 would not be implemented until the Supreme Court acted, this recommendation was forwarded to the Administrative Director out of cycle.

P. Proposed Amendments to *R.* 4:74-7 — Civil Commitment — Adults

In the 2002-2004 rules cycle, the Committee had considered and rejected the request for an amendment to *R.* 4:74-7 to permit the production and forwarding of the physician's certificate in electronic format. Upon a request for reconsideration of this issue in light of technological advances, the Committee members in this cycle reaffirmed their prior position. They declined to recommend a rule amendment because of the significant liberty interest at stake and the fact that the signature requirement presents minimal inconvenience to the physicians.

Q. Proposal for Registration of Process Servers in New Jersey

The President of the New Jersey Professional Process Servers Association proposed the establishment of a registration program for private process servers in New Jersey. The program included a code of conduct and suggested amendments to several court rules. The Committee was of the view that such a registry is not warranted in light of the court rules setting forth the qualifications for personal service of process. Furthermore, the Committee members were concerned that a registry such as the one proposed would encourage exclusivity.

Accordingly, the Committee declined to recommend implementation of the proposal.

III. OTHER RECOMMENDATIONS

A. Local Variations in Filing Requirements

At its March 25, 2004 meeting, the Conference of Assignment Judges considered the variation in local requirements in terms of the number of copies required when submitting particular documents for filing and asked the Practice Committees to review the rules that set the requirements for documents to be filed. The Conference suggested that those rules that do not at present specify how many copies should accompany the original should be amended to so provide. The goal is to make the rule requirements clear in all situations. The Conference of Civil Division Managers reviewed this matter and was of the opinion that, with respect to all civil documents being filed, it is sufficient to require an original and one copy, if the filer wishes a "filed" copy to be returned. Similarly, at its May 25, 2004 meeting, the Conference of Civil Presiding Judges recommended that *Rules* 1:5-6(b) and 1:6-4 be amended to make it clear that, if the attorney filing the paper wants a copy returned, he or she must also submit a copy of the original, along with a stamped, self-addressed envelope. The Committee discussed this issue and concluded that it is an administrative issue and, as such, is not appropriate material for a court rule. Rather, it should instead be the subject of an Administrative Directive.

B. Proposed Amendment to *R.* 4:38A —Centralized Management of Mass Torts

Believing that the "mass tort" designation can have potentially negative ramifications for defendants and the public, the Products Liability Committee of the New Jersey Defense Association requested that a more neutral phrase such as "MCL" or "Multi-County Litigation" be used instead of "mass tort." At an Administrative Conference, the Supreme Court considered this request and, while not reaching a final determination, preliminarily concluded that the request appeared to have merit. The Court referred the matter to the Committee with a request to consider the subject and make specific recommendations on an expedited basis. Following a discussion, the Committee agreed with the position expressed by Judge Hamlin, *i.e.,* that mass tort has become a term of art in modern jurisprudence as evidenced by the vast literature, by way of case law across the country, law review articles and other scholarly comment that addresses mass torts by that designation. The Committee was concerned that a change in the designation of these law suits would make the literature less accessible and perhaps less relevant. The Committee determined that the term should be retained. Judge Pressler drafted a memorandum to Judge Carchman expressing the Committee's view.

IV. MISCELLANEOUS MATTERS

A. Proposed Amendments to *R.* 2:5-3 — Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Form

Judge Stern had advised the Committee that the Appellate Division Management Committee had decided to eliminate the requirement that diskettes have to be ordered and paid for by counsel incident to the preparation of a transcript on appeal. The Committee recommended the amendment of *R.* 2:5-3(e) accordingly. Subsequently, Judge Stern advised the Committee that the Appellate Division Management Committee had rescinded its prior support for elimination of the diskette requirement. Consequently, the Committee withdrew its recommendation for proposed amendments to this rule.

B. Proposed Amendment to *R.* 4:10-2 — Scope of Discovery

A Committee member had suggested that *R.* 4:10-2 be amended to state that social security numbers are not discoverable except upon a showing of good cause. The Committee recognized that the disclosure of social security numbers is a judiciary-wide issue, not just limited to civil practice. Staff informed the Committee that the broader issue of what information contained in court documents may be deemed confidential has been brought to the attention of the Administrative Director and will likely be the subject of study by a committee.

APPENDIX — Report of the Dispositive Motions Subcommittee

Report of the Dispositive Motions Subcommittee
February 10, 2005

A meeting of the subcommittee was held on February 9, 2005, attended by Hon. Maurice Gallipoli, Hon. William Gilroy, Hon. Carmen Messano, Hon. Edith Payne, Gary Potters, Jeffrey Greenbaum, Darrell Fineman (by telephone) and Marianne Espinosa Murphy.

1. Motions pursuant to R. 4:6-2.

The Subcommittee was asked to consider whether there should be any rule changes

a. to incorporate a deadline for the filing of motions; and

b. to require that all defenses be raised in one motion

with the end result that, if not raised pursuant to these requirements, the defense would be waived.

At present, Rule 4:6-2 provides that motions regarding lack of subject matter jurisdiction (a) are nonwaivable and may be raised at any time and motions regarding personal jurisdiction and sufficiency of process (b),(c) and (d) are waived if not raised by motion within 90 days after service of the answer. The Subcommittee therefore focused on (e) (failure to state a claim) and (f) (failure to join a necessary party). Currently these defenses may be made in any pleading permitted or ordered, or by motion for summary judgment or at the trial on the merits. (R. 4:6-7).

It was the Subcommittee's understanding that the consideration of these questions was prompted by recent cases in which reviewing courts perceived that a litigant had withheld a dispositive defense, subjecting the adversary to unnecessary discovery and expense. *E.g., Knorr v. Smeal,* 178 N.J. 169 (2003). It was noted that the requirement that affidavit of merit conferences be held would obviate the risk that affidavit of merit motions would be filed unduly late in the litigation. In addition, a number of Appellate Division cases have supported the application of equitable relief in cases in which dispositive motions have been withheld.

The consensus reached was that the problems raised by the cases in question can adequately be addressed on a case by case basis and that no rule change is necessary to set a deadline or require the filing of all motions at once at this time.

2. Summary Judgment Motions

The Subcommittee was asked to consider whether there should be any changes to the Rules to impose a deadline for the filing of summary judgment motions at a point prior to trial.

The stated reasons in favor of a proposed change were to protect the credibility of the trial date and to avoid situations in which the filing of a motion returnable on the eve of trial will cause the trial date to be adjourned. In addition, it was anticipated that attorneys would welcome the opportunity to know whether a summary judgment motion would be granted in advance of the time when they would be engaged in trial preparation.

The reasons stated in opposition to such a rule change included the following. After *Ponden v. Ponden,* 374 N.J. Super. 1 (App. Div. 2004), parties are unlikely to consider a matter ripe for summary judgment until an arbitration or trial notice is issued, leaving a relatively short window of time in which a summary judgment motion must be filed. The imposition of strict deadlines will tend to discourage counsel from cooperating in the exchange of discovery after the discovery end date. The first trial date is generally perceived to be an artificial date.

The Subcommittee agreed that the imposition of a deadline for such motions should include the following: an extension of the time between the discovery end date and the trial; a deadline that is triggered by the actual trial date rather than the first trial date and a "safety valve." By a vote of 7 to 2, the Subcommittee agreed to recommend the following changes to the Rules:

R. 4:36-3(a) should be amended to provide that a matter shall be listed for trial no less than ten weeks after the discovery end date or the filing of a demand for a trial de novo.

R. 4:46 should be amended to provide that in cases assigned to Tracks I, II and III, dispositive motions must be made returnable at least 30 days prior to the actual trial date and may not be heard otherwise except for good cause shown. This requirement would not apply to cases assigned to Track IV, cases that are actively being case managed (regardless of Track assignment) and to matters in the Chancery Division.

Respectfully submitted,

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